Department of Law Monthly Report
January, 2008

Generally Speaking

COMINGS and GOINGS

Please Welcome:

Don Lardner, LOA I, Anchorage Torts & Workers' Compensation Section. **Dawn-Olene Hill, Collections Coordinator,** Anchorage Collection and Support Section. **Patrick Wilson, Microcomputer/Network Technician I,** Anchorage Administrative Services. **Sherese Holladay, LOA I,** Juneau Child Protection Section. Sherese comes to the department from the Department of Commerce, Community and Economic Development, Division of Investments.

The Kodiak DAO welcomed Paralegal **Thea Anthony**. Prior to coming to the DAO, Thea was at the Kodiak Office of Children's Services. The staff appreciated the help of **Susie Frenzel** from the Juneau CDCO, who traveled to Kodiak in order to assist with Thea's training and smooth transition.

The Fairbanks DAO welcomed back **ADA Corrine Vorenkamp** who returned from maternity leave.

IN THIS ISSUE

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS took emergency custody of an infant who presented with multiple bruises, malnutrition and dehydration. The parents could not explain the child's condition. The child was placed in emergency foster care.

OCS took emergency custody of a child after parents left him in the care of inappropriate caregivers. The child had been passed from relative to relative, none of whom wished to take care of him for any length of time. The child was placed in foster care.

OCS assumed emergency custody of a child with severely rotted teeth. When OCS made contact, the parents were found to be high on methamphetamines. No appropriate relative or friend of the family was willing or able to take care of the child. She was placed in foster care.

OCS assumed emergency custody of a 12-year-old child after it received a report that the mother

was under the influence of substances, was chasing the child about, was threatening sexual abuse and was threatening to kill herself in front of the child. The mother has a long history with OCS and the father has substance abuse issues.

OCS took emergency custody of a child after she was assaulted by her mother's boyfriend. The mother was aware that her boyfriend had been previously convicted of sexual assault, but allegedly left her child alone with him anyway. The mother also reported that she no longer wanted her child.

After a forensic interview, a child disclosed that she had been sexually assaulted by her mother's husband. Further investigation revealed that the mother knew her husband was a risk to the child. OCS assumed emergency custody and placed the child in a foster home. APD is investigating.

OCS assumed emergency custody of a child who was brought to the hospital with multiple brain hemorrhages and extreme bruising. The parents could offer no reasonable explanation for the injuries.

OCS assumed emergency custody after a baby's father held a shotgun to a baby-sitter's head. He demanded she take care of the baby until he got out of jail on drug and assault charges. No relative was available to take care of the infant.

Numerous other children across the state were taken into custody for substance abuse and domestic violence incidents.

Activities

Most child protection AAGs came to Anchorage for the statewide Children In Need Of Aid ("CINA") Conference on January 17-18, 2008. A number of people from the Office of Children's Services were able to attend as well. Many commented it was a productive and helpful conference.

Commercial and Fair Business

Breach of Contract Case Treated as an Administrative Appeal

On January 22 Anchorage Superior Court Judge Sharon Gleason decided that the breach of contract claim brought by New Mexico physician Ann-Marie Yost against defendant Division of Corporations, Business and Professional Licensing ("division") would be treated as an administrative appeal, thus vacating the trial that was scheduled to begin on January 28. Yost had entered into a memorandum of agreement ("MOA") with the division in 2005, providing that she would be issued a license to practice medicine in Alaska but that license would be conditioned with a $1,000 fine and a reprimand because she had failed to disclose on her application that she had previously been investigated in Washington.

At the time she entered into the agreement, Yost claimed that a division investigator orally promised that she or her attorney would be able to make a presentation to the State Medical Board ("board"), which had to approve the MOA. The investigator claimed that he had promised Yost only that she could attend the board meeting, but her participation would be up to the board.

On April 21, 2005, the board, which was meeting in Juneau, took up the MOA at an earlier time in the day than scheduled, and, when Yost's Washington attorney could not be reached by telephone, it adopted the MOA. Because the fine and reprimand were disciplinary sanctions, the board was required to file an adverse action report with the National Practitioner Data Bank ("NPDB").

Yost filed a complaint 20 months later, alleging that the division breached the covenant of good faith and fair dealing because the board adopted the MOA without allowing her or her attorney to participate. She asked the court to render the MOA "null and void" and to "withdraw" the report made to the NPDB. Since the court could not grant that relief without reversing the board's order

adopting the MOA, Judge Gleason ruled that the case would henceforth be treated as an administrative appeal, with an opportunity for additional briefing and oral argument. She also found the appeal to be timely, since the division never gave Yost notice that she had 30 days to appeal as required by Appellate Rule 602.

The judge acknowledged that the reason for this omission was that the MOA itself explicitly prohibited Yost from appealing the board's decision to superior court, and she indicated that she would give that provision considerable weight in deciding the appeal on the merits. AAG Robert Auth is representing the division in this proceeding.

State Medical Board Puts Anchorage Physician Under Probation

On January 24 the State Medical Board ("board") adopted a memorandum of agreement ("MOA") negotiated between the Division of Corporations, Business and Professional Licensing ("division") and Anchorage physician Kevin Tomera, which resolved all issues arising from the board's prior order requiring Dr. Tomera to submit to a psychiatric and medical evaluation. Pursuant to the MOA, Dr. Tomera's license has been placed on probation for five years and, during that time, he is required to be under the care of a primary health care provider. Also, for the first two years, he is to undergo monthly psychiatric care from a psychiatrist and a minimum of one hour of weekly psychotherapy from a doctorate level therapist. His work schedule is limited to 50 hours a week, excluding call time, and for at least the first six months of probation he is to have a practice monitor who will meet with him once a week to provide chart reviews and to communicate regularly with office staff, colleagues, and representatives at all hospitals in which he practices.

As Dr. Tomera is an urologist, during the first two months of probation, a random selection of ten percent of his charts will also be reviewed by a supervising urologist. During the first year, Dr. Tomera will be required to attend two quarterly board meetings in person to allow a review of his compliance with this probation. AAG Robert Auth represented the division in this proceeding and negotiated the MOA with Dr. Tomera's attorney.

Real Estate Appraiser Board Sanction

On January 11 the Alaska Board of Certified Real Estate Appraisers met to deliberate in a license discipline case against appraiser Kim Wold. The Administrative Law Judge ("ALJ") had issued a proposed decision in the case, finding numerous violations of the Uniform Standards of Professional Appraisal Practice ("USPAP") standards related to three appraisal reports prepared by Wold. The board decided to reject the ALJ's proposed decision and to consider the matter itself. After a full day of deliberations the board adopted the ALJ's factual findings, but increased the penalty for the violations. Anchorage AAG Robert Auth represented the Division of Corporations, Business and Professional Licensing in the case. Juneau AAG Gayle Horetski provided legal advice to the board, and is assisting the board in the preparation of the final written decision.

Alaska Housing Finance Corporation (AHFC) Defends Housing & Urban Development (HUD) Subsidy Suit

Joyce Moss, a recipient of Alaska Housing Finance Corporation's ("AHFC") Choice Voucher Program ("Voucher Program") filed suit against AHFC after it reduced her benefits under the Voucher Program from a two-bedroom subsidy to a one-bedroom subsidy. The Voucher Program is federally funded by the Department of Housing and Urban Development (hereinafter "HUD") and administered by local housing agencies, such as AHFC. The recipient claimed that she suffers from physical impairments that require her to exercise regularly and that the only way to meet this requirement is to receive a subsidy exception that would provide her with a second bedroom for her exercise equipment in her home.

Moss had received a two-bedroom subsidy from March 2004 until July 2005. Due to funding changes with HUD, AHFC had to take a closer look at all subsidy exceptions, including Ms. Moss' request. AHFC reviewed Moss' request for an additional bedroom and denied the request. In AHFC's letter denying the subsidy request, it provided Moss 10 business days to request an administrative review or an informal hearing. However, the letter from AHFC to Moss was dated January 23, 2006 but was not sent until January 31, 2006, and Moss did not receive the notice until Feb. 2, 2006. Essentially Ms. Moss was left with only one day to grieve the notice denying her an additional subsidy for an exercise room. AHFC has no explanation for why this letter was sent more than a week after it was dated.

Moss filed suit, claiming she received inadequate notice, which violated due process and claiming the decision not to give her a two-bedroom subsidy violated the Americans with Disabilities Act ("ADA") and the Fair Housing Act ("FHA"). Moss moved for summary judgment on the due process violation and the FHA/ADA claims. On January 8 Judge Rindner granted summary judgment on the due process violation and denied summary judgment on the FHA/ADA claim.

The due process claim hinged on the fact that there is no case law showing how much due process is enough to request a grievance procedure in an adverse action by a housing authority. Because AHFC had no way to account for mailing and no certificate of service, Judge Rindner determined that 10 business days from the date of mailing could effectively leave people with less than a week to respond, as occurred in this case. Judge Rindner found that allowing additional time to grieve an adverse action will create a fiscal and administrative burden for AHFC, but the effect of erroneously depriving a program participant of a subsidy would greatly outweigh AHFC's burden. He found that AHFC's existing practice failed to satisfy due process notice requirements, and that more procedural safeguards were necessary to protect participants from erroneous deprivation.

Prior to this decision by Judge Rindner, AHFC had already begun to allow participants 15 business days from date of mailing to grieve an adverse action and to include a certificate of service in these notices to prove the date of mailing. This additional due process protection was the result of another similar case that was settled.

Judge Rindner denied summary judgment on Moss' ADA and FHA claims. Moss claimed that AHFC violated the FHA and ADA when it did not grant her a reasonable accommodation request for an extra bedroom subsidy to house her exercise equipment. Based on the facts presented, Judge Rindner found that, as a matter of law, he could not find AHFC violated the FHA and ADA when it denied Moss' request.

While Moss' motion was granted on one part and denied on another part, Alaska Legal Services has asked that AHFC agree that, pursuant to Rule 82, they are the prevailing party and that AHFC agree to not contest the award of attorney's fees. AHFC has not agreed with this assessment, and will require Alaska Legal Services to move for attorney's fees.

Regulatory Commission of Alaska Defends Order Denying Intervention

AAG Bob Stoller filed an appellee's brief on behalf of the Regulatory Commission of Alaska in *Alaska Exchange Carrier's Association, Inc. v. Regulatory Commission of Alaska*, an appeal before the Alaska Supreme Court. In the underlying administrative proceeding before the commission, the association ("AECA") unsuccessfully attempted to intervene in a dispute between Interior Telephone Company ("Interior"), the local telephone company that serves Seward and Moose Pass on the one hand and AT&T Alascom and GCI on the other hand. Alascom and GCI provide long distance service to Seward and Moose Pass. Interior sought commission approval to move the point of interconnection between itself

and Alascom and GCI from Moose Pass to Seward. One consequence of this proposed relocation of facilities is that it would wind up being costly for Alascom and GCI, who opposed Interior's initiative.

The association claims it has a direct interest in the Interior vs. Alascom and GCI dispute. The association administers a tariff on behalf of Interior and twenty other local telephone companies, and that tariff (among other things) sets forth detailed procedures for addressing such "point-of-interconnection" disputes prior to the initiation of a formal proceeding at the commission. Citing its tariff, the association attempted to intervene in the commission's proceeding involving Interior's administrative litigation against Alascom and GCI.

The commission denied the association's request to intervene on the grounds that the association does not have a statutory right to intervene and the association's tariff is not at issue in the underlying dispute. The superior court (Judge Sen Tan) upheld the commission's ruling. The association now is attempting to have the Alaska Supreme Court rule that it has a statutory right to intervene before the commission. Alascom and GCI are co-appellees with the commission in this appeal.

Environmental

Tongass Conservation Society, et al. v. State, et al. The state prevailed in opposing the appellants' motion for attorney's fees and costs. Tongass Conservation Society, Southeast Alaska Conservation Council, and Natural Resources Defense Council (collectively "SEACC") appealed a Department of Environmental Conservation ("DEC") waste discharge permit for a log transfer facility near Ketchikan. The original permit holder sold the facility and transferred the permit to the new owner, who then requested that DEC terminate the permit since it would not be discharging into the water and therefore would not need a permit. SEACC moved for attorney's fees based on the argument that it had prevailed in getting the permit rescinded. The state argued that SEACC was not a prevailing party since the court did not resolve the main issue of the case, nor was SEACC entitled to fees and costs under the catalyst theory. The court agreed with the state on both accounts and denied SEACC's motion for fees and costs. AAG Lindsay Wolter handled this matter for the state.

Talbot's, Inc. v. State, et al. The Department of Natural Resources ("DNR") issued a consistency determination under the Alaska Coastal Management Program allowing a cruise ship berth project in Ketchikan to move forward. Talbot's, Inc., the neighboring landowner of the property where the berth is to be built, appealed the decision to the superior court and requested that a temporary restraining order ("TRO") be issued to halt any construction activities. The TRO was denied, and after several months of lively motion practice, the state was dismissed from the case. The state has moved for enhanced attorney's fees and costs. AAG Lindsay Wolter represents the state in this case.

Naknek Power Plant and the state have signed a compliance order by consent. Naknek violated several provisions of its air permit over the past several years. The facility submitted past-due reports, has paid a $15,000 penalty, and has agreed to spend at least $50,000 on bringing geothermal power to the Bristol Bay area. This enforcement matter was handled by AAG Lindsay Wolter.

Human Services

Litigation

Elita Muhlenbruch v. State of Alaska, Department of Health & Social Services, Division of Health Care Services. AAG Rebecca Polizzotto received a first decision by Judge Joel Bolger. In his decision, Judge Bolger ruled in favor of the

department with respect to the issue of equitable estoppel. However, Judge Bolger also held that Medicaid providers had a protected property interest in Medicaid payments and as a result were entitled to an evidentiary hearing for purposes of disputing the state's audit findings. AAG Polizzotto filed a petition for rehearing arguing that Judge Bolger erred in equating a Medicaid Provider's interest to that of a Medicaid recipient. Judge Bolger has invited reply from opposing counsel with respect to the petition for rehearing.

Respiratory & Medical Services, Inc., v. State of Alaska. AAG Rebecca Polizzotto also received a decision in this case. Presented was an issue of first impression for Alaska: whether the department could use statistical extrapolation to determine the amount of a Medicaid provider overpayment. Judge Volland ruled in favor of the department. This decision validates the department's audit methodology and allows the department to recoup approximately $55,000 from this provider.

Carla Allen v. Department of Health & Social Services, Division of Public Assistance. AAG Rebecca Polizzotto filed the state's supreme court brief. The issues presented for review are: whether the defense of equitable estoppel is preempted by the federal Food Stamp Act and whether the notice sent to Ms. Allen regarding the department's recouping of an overpayment of food stamps violated Ms. Allen's due process rights. Ms. Allen appeals from the superior court decision finding in favor of the department on both issues.

Christa Rogers v. Department of Health & Social Services. AAG Rebecca Polizzotto reached a settlement agreement with the appellant in this case. It was an appeal of the division's denial of a variance for a barring condition. Because the department enacted emergency regulations allowing for variances of permanent barriers, the case was reviewed, and the client determined a variance was appropriate under the facts of this case.

Santiago Assisted Living Home v. Department of Health & Social Services, Department of Public Health, Certification and Licensing. AAG Rebecca Polizzotto filed a motion for summary judgment. In this case the administrator's license was revoked due to the existence of a barring condition.

Judge Michalski granted the summary judgment in favor of the state and Advanced Pain Centers of Alaska in the Certificate of Need case involving the Mat-Su Valley Hospital. In that order, Judge Michalski held that, AS 18.07.091 did not allow for injunctive relief in this case because the ambulatory surgical center did not have a Certificate of Need. The section is moving for final judgment and costs and fees.

Judge Rindner denied a motion for summary judgment filed by the Northern Justice Project, finding that foster parents do not have a protected property interest in an overpayment. The matter was handled by AAG Dianne Olsen before she retired, then handled by AAG Diane Foster. Section Supervisor Stacie Kraly did the oral argument in September. The Northern Justice Project notified her of its intent to appeal that decision.

Judge Morse entered an order granting a temporary restraining order in *Radenbaugh*, but on other grounds than what was sought by Alaska Legal Services. The court found that 7 AAC 07.751(g) required the state to conduct a collateral inquiry prior to denying or terminating any one from the Personal Care Attendant program. This was not a claim raised by Alaska Legal Services, but was a correct reading of the statute. The section is in the process of advising the department on how to implement this decision.

The section continues to work on discovery disputes in the *Curyung* matter, having filed an opposition to the motion to compel. The section is also working hard on developing a master list of children who are "part" of this litigation in order to better manage the discovery.

Section Supervisor Kraly is in the midst of managing three administrative appeals related to the Certificate of Need program. All three cases have been referred, briefing has commenced in one, and the other matters are in flux while the parties determine how to prepare the record, in light of the expanse of the record and the cost associated with the production.

Medicaid

Subrogation/Liens

During the month of January, the Medicaid subrogation team collected a total of $118,144.47 because of 15 case resolutions, including one estate recovery matter. The current caseload of open third-party liability subrogation matters is 686. The team has resolved 1,151 matters since 2005. In addition to the day-to-day handling of reimbursement claims, the section is defending a declaratory relief action brought by a Medicaid recipient who seeks to invalidate AS 47.05.070 and 47.05.075 pertaining to the state's rights and responsibilities in connection with Medicaid liens and subrogation.

Other

Section Supervisor Kraly taught a due process 101 class to day care assistance providers related to what constitutes a good notice.

Labor and State Affairs

Education

On very short notice, AAG Sarah Felix handled a hearing on January 18 for the Department of Education and Early Development concerning the Delta/Greely School District. The district appealed from the department's capital improvement grant funding decision. The hearing, which took a full day, concerned whether the district's proposal was for a major maintenance or school construction project. The district's position is that the $37 million project was maintenance, but the department had concluded that it was really construction. The difference is important because maintenance projects tend to have priority for legislative funding.

Elections

Kohlhaas v. State. On January 4 Judge Smith granted the state's motion for summary judgment. This case challenged the lieutenant governor's denial of the latest initiative application on the subject of Alaska becoming an independent nation. The court upheld the lieutenant governor's decision, agreeing that the proposed initiative was barred by the Alaska Supreme Court's decision in *Kohlhaas v. State, Lt. Gov.*, 47 P.3d. 714 (Alaska 2006). In the earlier *Kohlhaas* case, the Court upheld an earlier denial of certification of an initiative application calling for Alaska to become an independent nation. The sponsors of the current initiative tried to avoid the effect of this decision by framing the initiative as a request for the state to seek changes in law to allow Alaskan independence. However, Judge Smith found that the initiative proposed secession from the United States. Because that goal is unconstitutional, the court concluded that it was an improper subject for an initiative. AAG Sarah Felix handled this matter.

Employment

Baseden v. State of Alaska. On January 4, the Alaska Supreme Court issued its decision in this case. Mr. Baseden, a former Department of Transportation employee, filed three suits against the state claiming wrongful discharge and seeking to overturn two labor arbitration decisions relating to his employment. The facts concerned his discharge from employment in 2000, the state's subsequent reinstatement of his employment, Baseden's failure to report for work, and the state's second discharge of Baseden based on his abandonment of his position. The main legal issue was whether to affirm the arbitrators' decisions concluding that Baseden's rejection of the state's offer of reinstatement was just cause under the collective bargaining agreement to discharge Baseden on the basis of abandonment.

The Court affirmed the arbitrators' decisions and denied the appeal. The Court stated that it gives "great deference" to an arbitrator's decision and that it reviews arbitration decisions according to either the gross error or arbitrary and capricious standards of review, and that the arbitrators' decisions withstood scrutiny under either standard. The Court found that the first arbitrator who considered Baseden's claims did not act in an arbitrary or capricious manner or commit gross error when he concluded that Baseden's refusal to return to work was unjustified because the reinstatement was to the same position (engineer) with the same job duties. The Court also found that the second arbitrator reviewing Baseden's claims acted appropriately in deferring to the first arbitrator's decision. Finally, the Court held that the superior court did not abuse its authority in consolidating Baseden's three suits because they all related to his discharge from state employment. AAG Bill Milks handled this matter.

State v. Equal Employment Opportunity Commission (EEOC). On January 7, the Ninth Circuit directed the state to respond to the petitions for rehearing and for rehearing en banc filed by respondents EEOC and the U.S. and intervener Margaret G. Ward. These motions follow the decision of a three-judge panel of the Ninth Circuit, which held that the 11th Amendment provided the state with immunity from claims by individuals under the Government Employees Rights Act ("GERA"). GERA was enacted in 1991 to extend the protections of Title VII to elected officials' personal staff and advisors. The employment claims here were filed with the EEOC by two members of Governor Hickel's personal staff who were discharged in 1994. AAG Brenda Page will be filing the state's response.

Labor and Workforce Development

Helms v. Department of Labor and Workforce Development. AAG Larry McKinstry filed a brief in this superior court case on January 8. The issue is the interplay between the Employment Security Division's travel regulations and a claimant's place of residence. The appellant apparently has two residences, one in Nome and one in Anchorage. He travels between the two and out of state frequently. Most of the travel is personal and he does not look for work while traveling. Because he is a law clerk and does contract work for attorneys, the location where he performs the work is not necessarily the location where the work was offered. In this case, the commissioner determined that Nome was the primary residence for purposes of applying the travel regulations. Because the appellant's travel was not for an allowed purpose (to look for work or to obtain medical treatment, for example), the department denied the benefits during time away from Nome, and the appellant appealed.

Local Boundary Commission

On January 22 Judge Stephens denied a stay that the City of Craig requested of the Local Boundary Commission's decision to annex territory to the Ketchikan Gateway Borough. The city sought the stay to prevent the annexation from being presented to the legislature this session, which would have delayed annexation for at least another year. The legislature now has 45 days to void the annexation or it will become effective by tacit approval. AAG Margie Vandor handled this matter with assistance from AAG Rachel Witty.

Procurement

SE Extinguisher protested the Department of Health and Social Services' award of a defibrillator contract based on an argument that the winning bidder was not compliant with the Americans with Disabilities Act by filing a bid protest with the Office of Administrative Hearings ("OAH"). However, the company withdrew its bid protest after reviewing the department's response to the

OAH. AAG Rachel Witty represented the department in this matter.

Public Offices Commission

Stevens v. Alaska Public Offices Commission. AAG Mags Paton-Walsh defended the Alaska Public Offices Commission against former Senator Ben Stevens' appeal from its decision that he violated the requirements of the legislative financial disclosure law by failing to report income that he chose to defer but earned as a board member in 2005. The senator's argument is that, by electing not to receive compensation in the year that it is earned, he can avoid reporting it. The argument was before Superior Court Judge Rindner on January 18, and the court took the matter under advisement.

Retirement and Benefits

Administrative Law Judge Chris Kennedy issued a ruling in a claim by a retired state worker to add cashed-in leave to his annual calculation for purposes of computing his retirement benefit. The administrative law judge found that at one time during this employee's active service, the employee could have cashed in as many as five days of annual leave and have that amount included in his total annual compensation for purposes of calculating his Public Employees Retirement System ("PERS") benefit. But at another time during the employee's service, the law was changed to increase the rate used to calculate benefits from two to two and one-half percent annually depending on the number of years of credited service. Because a retiree cannot pick and choose terms from among the various systems in effect over the years and must select one for the purpose of calculating the retirement benefit, and because the later system provided a larger benefit overall than the earlier system crediting five additional days of pay per year, the administrative law judge declined to adjust the rate. AAG Toby Steinberger handled this matter for the Division of Retirement and Benefits.

On January 14 AAG Joan Wilkerson received a proposed decision from the Office of Administrative Hearings in a case in which a husband opted for a level retirement benefit when he retired. As required, he filed his spouse's waiver of survivor benefit when he made this election. Because the retiree chose the level retirement benefit, the division paid a significantly higher benefit to the retired worker during his life. However, after the retiree died, his wife filed a claim for survivor benefits. The proposed decision would affirm the administrator's denial for several reasons: the instructions on the form on which the retiree signaled his choice of the level benefit option clearly advised of the consequences of that choice; the wife knew she had signed a waiver; and the waiver form also adequately explained its effect.

Alford v. State. On January 14 AAG Gina Ragle argued this case before the Alaska Supreme Court. Because of weather-related flight cancellations and delays, she participated telephonically from Juneau (as did Justice Carpeneti). This case is about the computation of the retirement benefits of nine Public Employees Retirement System ("PERS") members who were first hired before July 1, 1977, took early retirement, were rehired in PERS-eligible positions, and then retired again. The members appealed from the methodology applied by the Division of Retirement and Benefits to calculate their benefits, and they proposed an alternative method that would provide them with higher benefits. Also at issue was whether the division's determination was due a deferential standard of review.

Workers' Compensation

Barrington v. Alaska Communications Systems Group, Inc. AAG Krista Stearns argued this case before the Alaska Supreme Court on January 14 on behalf of the Alaska Workers' Compensation Appeals Commission. The commission appeared in this appeal for the limited purpose of arguing that its decision, not the decision of the Workers' Compensation Board, is the final administrative decision to be reviewed by the Court. This is the first appeal following a commission decision, and Dr. Barrington's appeal had indicated that he was

appealing from the decision of the board despite AS 23.30.129, which provides for judicial review of commission orders to the Alaska Supreme Court.

Legislation and Regulations

During January, the Legislation and Regulations Section spent a busy month editing legislation for introduction in the regular session. The regular session convened January 15. The section edited the first bill review for a bill passed during the regular session, and edited and legally approved for filing the following regulations projects: 1. Department of Labor and Workforce Development (miscellaneous wage and hour regulations amendments); 2. Department of Education and Early Development (required immunizations; work ready and college ready transitional skills assessment); 3. Department of Health and Social Services (emergency regulations on home and community-based waiver services for severely emotionally disturbed children with fetal alcohol spectrum disorders; emergency regulations on barrier crimes, the centralized registry and community care licensing). The section also assisted in the preparation of urgent single audit regulations for the Department of Administration.

Natural Resources

Endangered Species Act Issues

AAG Anne Nelson assisted the Department of Fish and Game in submitting comments to NOAA ("National Oceanic & Atmospheric Administration") Fisheries on the remand draft of the Federal Columbia River Power System and Snake River System Biological Opinions ("BiOP") developed under section 7 of the Endangered Species Act ("ESA"). Section 7 of the ESA requires that federal agencies that are contemplating action that may affect threatened or endangered species or designated critical habitat for threatened or endangered species consult with NOAA Fisheries or the U.S. Fish & Wildlife Service regarding the impact of the contemplated action on the listed species. The federal operators of the Columbia River and Snake River hydroelectric projects submitted a 10-year operating plan to NOAA Fisheries back in 1999 for review under section 7.

Alaska has an interest in this issue because operation of the dams affects threatened salmon populations, some of which are subject to regulation under the Pacific Salmon Treaty and intermingle with stocks fished in Alaska fisheries. The BiOP was originally issued in 2000, but was immediately challenged in litigation that has traveled (and continues to travel) through the federal district court in Oregon as well as the Ninth Circuit. The BiOP has been remanded to NOAA twice for revision, with the current version representing NOAA's third attempt to produce a legally sufficient opinion. Alaska's comments addressed the sufficiency of the data used by NOAA as well as the ways in which the analytical methodology employed by NOAA failed to meet legal requirements. The parties to the litigation currently are engaged in motion practice over the due date for the "final" BiOP.

In keeping with the ESA section 7 focus this month, AAG Anne Nelson also provided legal advice to the Department of Fish and Game regarding the requirements of section 7 of the Endangered Species Act and how those requirements affect the process of renegotiating parts of the Pacific Salmon Treaty between the United States and Canada. The Chinook chapter of the treaty expires in December 2008, and one of the Deputy Commissioners of Fish and Game is a Pacific Salmon Treaty Commissioner. Implementation of any new treaty provision would trigger the ESA section 7 requirement to consult with NOAA Fisheries regarding the impact of the new provision on threatened and endangered species affected by the treaty, and changes to the treaty would require the consultation process be reinitiated. Therefore, the structure of the agreement affects the consultation process.

2006 Parks Highway Fire Litigation

The state received a favorable ruling on a summary judgment motion in the 2006 Parks Highway fire litigation. In this case, the individual who started the fire interpled the proceeds of his homeowner's liability policy and named as defendants parties who have damage claims arising from the fire. The state incurred several million dollars in suppression costs, several parties' homes burned, and the local Native corporation has claimed damages from burned timber and lost cultural and subsistence value of their lands. The Native corporation filed a motion for summary judgment asking the judge to rule that the insurance policy terms precluded the state from recovering any of its suppression costs from the interpled funds because the policy only covered property damage. The judge disagreed and ruled that the state's suppression costs fell within the policy's coverage. The Native corporation asked for reconsideration of the decision and the judge denied that motion as well. AAG Anne Nelson represents the state in this case.

Briggs v. Commercial Fisheries Entry Commission (CFEC). On January 14 AAG Colleen Moore received a favorable decision in the superior court appeal of *Roland, Lucinda, and Tirzalee Briggs v. CFEC*. This case involves the last three limited entry permit applications for the Bristol Bay drift gillnet fishery. The three applicants are siblings, who fished with their parents in Ugashik during the 1960's and 70's. They had already applied for and received limited entry permits for the set net fishery. With respect to the drift gillnet fishery, they were awarded points for their domicile and for fishing as crewmembers, but they claimed that they were entitled to additional points for income dependence and gear ownership on the basis that they were in partnership with their parents. The court agreed that there was substantial evidence to support the commission's decision that the family fishing business was the parents' business, not a family partnership. The court acknowledged that the children were only 1, 4, and 13-years-old when the business started, and that the children did not participate in the plans, strategy, or financing of the business. It also agreed that the income from the business was distributed unequally and for family needs (e.g., a bicycle, college expenses) rather than as a partnership entitlement. The court also rejected the appellants' claim that they were entitled to additional points for past participation as gear license holders either because their parents failed to purchase gear licenses for them or because Fish & Game did not enforce the gear license requirement and allowed drift gillnet fishing without a gear license. Finally, the court found that the appellants were not denied due process during the 31 years that their applications were in process, during which they received the windfall of fishing on interim use permits.

King v. State, Department of Natural Resources. This case was filed in 2003, and involved an accretion claim to almost 11 acres of land near Juneau. The state disputed that the plaintiffs were entitled to all of the 11 acres claimed, but was willing to stipulate to approximately 2.2 acres. After several procedural hurdles, including the state's successful motion to set aside a 2003 inadvertently-entered decree quieting title to all 11 acres, the plaintiffs agreed to resolve the case through a stipulation to quiet title to the 2.2 acres. They reserved their right to bring an action to claim the remaining 8.8 acres at another time. AAG Colleen Moore represented the state in this case.

Board of Fisheries and Board of Game Meetings

AAG Lance Nelson participated in two Board of Fisheries meetings in January. The first meeting in Anchorage involved Chignik area regulatory proposals, dealing mostly with salmon fisheries. The second was a five-day meeting in Kodiak and included the board's adoption of a regulation allowing a salmon setnet permit holder who owns two permits to operate two units of gear. This kind of regulation was authorized by HB 251, enacted by the legislature in 2006 (codified at AS

16.05.251(i)) to allow some consolidation in the commercial salmon fisheries.

AAG Kevin Saxby attended the Muskox Cooperators meeting in Nome from January 7-9. This group advises the Board of Game and the Federal Subsistence Board on muskox regulations for the Seward Peninsula. Several new hunts were authorized for this expanding herd.

From January 24-28, AAG Saxby attended the Board of Game meeting in Anchorage. Statewide regulations were considered and several important changes were made in areas including trophy destruction for subsistence hunts, use of artificial lights to track wounded game, and some other areas. A number of other proposed regulations were deferred until the March meeting in Fairbanks.

Alaska Grown Litigation

On January 4 Anchorage Superior Court Judge Jack Smith granted summary judgment in the Division of Agriculture's favor on all claims raised in the trademark infringement lawsuit involving ownership of the Alaska Grown logo and control over its promotional use. Among other things, Judge Smith ruled that (1) the division had been the sole and exclusive owner of the Alaska Grown logo since 1986; (2) the defendant Mat-Su Chapter-Alaska Farm Bureau, Inc. (Mat-Su Chapter) had no rights in the logo; and (3) the Mat-Su Chapter had infringed the division's rights in the logo since November 18, 2005. AAG Steve Ross represents the division in the case.

Opinions, Appeals & Ethics

Ethics

The section reports AAG Judy Bockmon is actively working on three investigations or complaint matters. Four requests for conflict waivers were received and granted this month.

Appeals/Litigation

Krone v. State. AAG Dave Jones submitted to the Alaska Supreme Court a brief opposing Northern Justice Project's appeal of the denial of its request for an award of triple its reasonable attorney fees. Although the trial court awarded it full attorney fees, Northern Justice Project wanted more. Under its fee agreement with its clients, Northern Justice Project agreed to accept as its attorney fees whatever the court awarded. After prevailing in the case, Northern Justice Project asked the trial court to award it attorney fees that represented triple the amount of its "reasonable attorney fees," an amount calculated by multiplying the number of hours worked on the case by designated hourly rates. Initially, the trial court awarded Northern Justice Project double that amount.

However, the trial court reconsidered its award when the Alaska Supreme Court, in *State v. Native Village of Nunapitchuk*, upheld the 2003 legislation overturning the public interest litigant doctrine. On reconsideration, the trial court awarded Northern Justice Project full attorney fees, rather than double or triple that amount. Northern Justice Project asserts on appeal that the trial court misinterpreted the effect of *Nunapitchuk*. The section contends the trial court appropriately concluded that Northern Justice Project was not entitled to a double or triple award.

W.W. v. State. AAG Megan Webb prepared the appellee's brief in an appeal involving the adjudication of four children as children in need of aid based on domestic violence in the family home. The father appealed arguing that the Office of Children's Services ("OCS") failed to make active efforts to reunify the family, as required by the Indian Child Welfare Act. The state argued that the trial court did not err in making this finding because over the course of several years, OCS has provided a variety of services to this family, including making referrals to the local shelter, domestic violence intervention programs, a domestic violence support group, parenting classes, substance abuse assessments, mental health

assessments, family support services, and visits with the children. It also provided services to the children, including psychological evaluations, counseling, clothing, medical and dental care, and access to a cultural program. While the children participated in the beneficial services, the parents both adamantly and repeatedly refused to communicate with OCS, to comply with their case plans, or to participate in any of the recommended services.

Seth D. v. State, Department of Health & Social Services, Office of Children's Services. The Alaska Supreme Court issued an opinion in this case, affirming the trial court's order terminating the father's parental rights to his daughter. The father was a state prisoner who asked to be transported so he could attend the termination trial. The trial court denied his request, noting that he could participate telephonically. The trial court also noted that it would take breaks to allow the father and his attorney to consult with one another as needed. The father was able to participate in the last two days of the six-day trial in person, having been released from custody on electronic monitoring. On appeal, the father argued that the trial court violated his right to due process and abused its discretion in denying his request for transportation. The supreme court rejected both arguments.

In relation to due process, the father asserted he should have been transported in order to testify in person and to observe the trial in person. The supreme court noted his right to due process was not violated under the first argument because the father did testify in person. In relation to the second issue, the court rejected the father's argument that his alleged learning disability made his personal appearance necessary, noting that even if his disability prevented him from understanding testimony telephonically, he failed to demonstrate that the trial would have been different had he been sitting next to counsel rather than participating telephonically.

In relation to his statutory rights, the father argued that the trial court abused its discretion by refusing to order his transport pursuant to AS 33.30.081. The court also rejected this argument. However, it noted that "[i]f a parent wishes to testify at a termination trial, the state must present sufficient evidence allowing the superior court to decide knowledgeably whether to grant a motion for transport made under AS 33.30.081." It then noted that the opposition to transport filed by the Department of Corrections ("DOC") lacked sufficient analysis or information to permit the trial court to properly consider whether to grant the father's motion. However, because the father's period of incarceration fortuitously ended, permitting him to participate in the termination trial in person, it affirmed the trial court's decision. But "in the future, in opposing a transport motion made by an imprisoned parent seeking to testify at a termination proceeding, the state must provide a specific showing, and the trial court must determine whether the state's showing is specific and sufficient before denying a motion to transport."

The father also challenged several other aspects of the termination order. The supreme court rejected each argument, affirming the trial court's findings that the child was in need of aid pursuant to AS 47.10.011(1), (8), and (10), that the father failed to remedy his conduct within a reasonable time, and that termination was in the child's best interests.

Chief Justice Fabe wrote a concurring opinion, noting that "the cost of transportation, standing alone, should not be sufficient as grounds for denying a prisoner the right to testify in person at trial on termination of parental rights," particularly since appearing in person is an essential part of the right to testify. Here, "[o]nly the fortuity of Seth D.'s release from prison before the conclusion of his hearing rendered the superior court's decision to deny transport harmless error." The Chief Justice explained that the "interest at stake in potential termination of [the fundamental right to the care and custody of one's own child] may not always lead to a decision that a 'prisoner's personal appearance is essential to the just disposition of the action.' But it should in many

cases. Where security risks or other extraordinary circumstances are absent, the due process clause dictates that a just disposition in a parental rights termination trial included permitting requested in-person testimony." AAG Michelle Higuchi handled the case below; AAG Megan Webb did the appeal.

Tanana v. State. This case challenges a 2004 formal attorney general opinion that concluded that Alaska Native villages do not have inherent jurisdiction to initiate child protection proceedings outside of Indian country under the Indian Child Welfare Act. The superior court ruled against the state on that issue.

After the superior court issued its ruling, the Native villages moved for a preliminary injunction while they engaged in further discovery. The state opposed the motion and moved for entry of final judgment. In December 2007, the superior court denied the village-plaintiffs' motion for preliminary injunction from the bench following oral argument. The court ordered the villages to submit a final judgment and a draft permanent injunction.

This month, the plaintiffs lodged an injunction that would, among other things, require the state to give full faith and credit to all orders entered by the Alaska Native village plaintiffs in Indian Child Welfare Act cases without first requiring them to be registered under state law and requiring the state to cede all investigatory authority to the village plaintiffs concerning reports of harm for their member-children unless the villages first consented to having the state investigate.

The state filed an opposition, arguing that the full faith and credit obligations of the Indian Child Welfare Act do not cover investigations and further arguing that the villages must register their orders with the state superior court under Alaska's version of the Uniform Foreign Judgments Act in order to give the state and parties the opportunity to oppose the application of full faith and credit on a case-by-case basis. The state also argues that full faith and credit does not require it to apply to the plaintiff villages informal procedures it has used occasionally in the past concerning Welfare Act orders of the Metlakatla Indian Community.

One of the subsidiary issues in this case is whether the state has a mandatory duty to investigate all reports of harm. The village plaintiffs assert that the state does not have a mandatory duty because AS 47.17.030(a) authorizes the state to refer the investigations of reports of harm to local governments for children living within their boundaries. They allege that they are "local governments" under that statute. The state opposed arguing that the legislative history of the undefined term "local government" does not support treating Native village councils as local governments for the purpose of section .030(a).

At the December hearing, the state brought *State v. Aleut Corporation* to the court's attention. Under *Aleut*, Native villages do not have the capacity to assert rights granted by state statutes to local communities when those local communities are served by a municipality formed under state law. Because each of the villages in this case are served by a municipal government, the state argues that AS 47.17.030 would only authorize the state to refer investigations to the city governments under state supervision, not to the Native village councils. The village plaintiffs asked for supplemental briefing on this issue and the state was given an opportunity to respond. That briefing was also submitted this month.

Other Matters

AAG Mike Hotchkin addressed the attorneys of the Child Protection Section and the Department of Health & Social Services social worker supervisors at the annual statewide joint Department of Law/Department of Health and Social Services Child Protection Conference in Anchorage. AAG Hotchkin updated conference participants on the evolving state of child protection and Indian child welfare law in Alaska, as illustrated by recent state

supreme court decisions, and moderated a round-table discussion regarding issues of concern that are presently pending in the state's trial and appellate courts.

Regulatory Affairs and Public Advocacy (RAPA)

Public Advocate Advisory

FCC/Digital Television Conversion Deadline. RAPA issued a Public Advocate Advisory ("PAA") on January 23 (via the Governor's office media list) advising Alaskans that the nation-wide transition from analog to digital television broadcast signals has begun. As authorized by federal legislation, all households will now be eligible to receive two, $40 coupons toward purchase of a digital converter box. Without one, analog TV sets will no longer be able to receive signals once digital broadcasting begins in February 2009. The PAA provides information regarding the coupon program, including web and voice contact particulars.

New Cases

RCA/U-07-144, Adak Telephone Utility. Adak Eagle Enterprises, LLC d/b/a Adak Telephone Utility ("Adak") filed a simplified rate filing before the Regulatory Commission of Alaska ("RCA") proposing to *reduce* rates by 25 percent, as opposed to a potential rate reduction of 56 percent, because it seeks to avoid a whipsaw effect in subsequent, near-term rates due to anticipated cost increases. On December 24, the commission suspended the filing and invited the attorney general to participate in the case. RAPA filed a notice of attorney general election to participate on January 18. The case will involve review of the utility's cost estimates and the methodology of application of Adak's universal service fund subsidy. Due to the small size of the utility, even a small change in its revenue requirement will have a dramatic effect on local rates (currently $100/mo.). A procedural schedule has not yet been set.

RCA/U-07-174, Enstar Depreciation Study. Enstar Natural Gas Co. and Alaska Pipeline Co. ("Enstar") filed their *first* depreciation study of company plant in service. The Regulatory Commission of Alaska ("RCA") suspended the filing on December 21, 2007 and invited the attorney general to participate in the case. RAPA filed a notice of attorney general election to participate on January 18. The outcome of a depreciation study can be a significant factor in determining the revenue requirement and related rates of a utility. Enstar will be subject to a full rate case review later this year, as required by prior commission order. RAPA's pre-filed, direct testimony regarding the utility's proposed depreciation rates is due April 18 with an adjudicatory hearing scheduled for June 2008.

RAPA South Office Remodel

On January 21 the contractor began renovating the vacant office space in RAPA's office location at the ConocoPhillips building. Completion of the remodel will provide an office for one of the two RAPA analyst (PAUA I) professional positions that are currently under recruitment. RAPA is recruiting for an economist and a financial or engineering analyst to provide expert testimony in utility cases.

Torts and Workers' Compensation

Glover v. State of Alaska. The Alaska Supreme Court issued a decision affirming the decision of Superior Court Judge Patricia Collins in all respects and upholding the validity of a sovereign immunity statute enacted in 2003. The statute, AS 09.50.250(5), explicitly withdrew the state's consent to be sued by seamen who are state employees and instead provided them with workers' compensation as the exclusive remedy for work-related injuries. Prior to this change in the law, state ferry workers and employees who worked at sea in a few state agencies could file tort lawsuits against their state employer under the Jones Act or maritime law. This case challenged the statute

on numerous state and federal constitutional grounds.

The supreme court rejected all of the plaintiff's arguments and held that the statute is constitutionally valid. Perhaps most significantly, the Court settled a question presumed but never expressly decided in the 52 years since the Alaska Constitution was drafted: does article II, section 21 of the constitution absolutely waive the state's immunity from suit such that it deprives the legislature of authority to determine in what circumstances the state can be sued? The Court determined that the answer is no.

The lower court had awarded the state $1,000 attorney's fees as a prevailing party; this amount was considerably lower than the amount the Rule 82 schedule would normally provide (nearly $13,000). The lower court based its reduction on "other equitable factors" under Rule 82(k). The state had appealed this ruling, on grounds it was tantamount to establishing a modified public interest litigant test. The supreme court affirmed the lower court's award as not manifestly unreasonable, although it mentioned Rule 82(i) or (j) as providing alternative grounds for the reduced award. The case was defended by AAG Susan Cox both at the trial court and supreme court.

Diaz v. State of Alaska, Department of Corrections, et al. Superior Court Judge Michael Spaan granted summary judgment in favor of three individually-named Department of Corrections employees, represented by AAG Ruth Botstein. Plaintiff Wenona Diaz was a prison inmate who was approved to serve her felony sentence under house arrest as part of the Department of Correction's Electronic Monitoring Program. While Diaz was serving her sentence, her employer accused Diaz of stealing from the travel agency where she worked. Diaz was questioned about the allegations, which she denied.

The state defendants, Diaz's probation/parole officers on the Electronic Monitoring Program, then acted to protect the public safety and transferred Diaz to a secure correctional facility, where she served the remainder of her prison sentence. Diaz was never arrested or charged with any new crime, but her employer, who had accused Diaz of stealing, was herself convicted of wire fraud in connection with malfeasance at the travel agency. Diaz sued the state defendants and several other parties. Diaz alleged that state defendants violated her due process and other constitutional rights when they allowed her to be questioned about the theft allegations and then removed her from the Electronic Monitoring Program.

In 2006, Judge Craig Stowers dismissed all state law claims against the state defendants, finding that Alaska law does not permit tort suits alleging direct violation of state constitutional rights. This month, Judge Spaan dismissed all the federal constitutional and 42 U.S.C. Sec. 1983 claims against the state defendants. Judge Spaan found that Diaz's allegations implicated no cognizable rights under the United States Constitution. Under federal law, Diaz had no due process right to remain on the Electronic Monitoring Program and could be transferred to a correctional facility at the Department of Correction's discretion. Her allegations that she was improperly questioned did not implicate her right against self-incrimination because she was never charged or prosecuted with any new crimes. An appeal is expected.

Transportation

Transportation Section Assists Other Sections

During January, Section Supervisor Jim Cantor assisted the Child Protection and Opinions, Appeals and Ethics Sections, by filing a supreme court brief seeking to uphold the termination of a parent's rights.

CRIMINAL DIVISION

Anchorage DAO

The Anchorage DAO conducted 11 trials and 81 grand juries this month.

ADA Joy Green-Armstrong won her first trial, a failure to register as a sex offender case.

ADA John Skidmore ran into a strange turn of events in the murder trial of Randy McDaniel. The defense admitted that defendant was present, that he shot at the victim nine times, but argued that he did it in self-defense. The jury hung, however, when a juror decided that the defense attorney had sold his client down the river and that the defendant was not really present.

ADA Michal Stryszak tried James Marquis for theft in the first degree and second degree burglary for his accomplice role in a pair of electronics store burglaries.

ADA Alan Goodwin convicted Johnie Jenkins of first degree sexual assault involving a woman who was so intoxicated that she could not remember precisely what sexual acts might have been performed on her body. Fortunately, a third party could hear her yelling for help and the jury could infer the rest.

DA Adrienne Bachman and ADA Michelle Tschumper tried Tylan Fely for first degree murder. The verdict is pending.

ADA Kat Runnels convicted meth cook Susan Soss of multiple drugs counts. Soss burned herself badly in a meth lab explosion. Soss and her son then called 911, but only after leaving the scene. They said they would "meet the paramedics" and declined to disclose the location of the explosion which led to her scarring burns. Apparently it was fairly easy to find the burning building. The jury also convicted of two aggravating factors – risk of injury to three or more and in the presence of a child.

ADA Helen Hickmon succeeded in bringing the long, tortured tale of Yuri Berezyuk to a close. Berezyuk imported 315.6 grams of heroin. Part of the defense was duress.

Barrow DAO

Fairbanks DA Mike Gray supervises the Barrow offices and is pleased to report some successful outcomes during the month.

An 18-year-old Barrow resident was sentenced for assault in the third degree, felony leaving the scene, and driving while under the influence for a July incident in which he lost control of his four-wheeler while driving intoxicated and hit a seven-year-old boy riding his bike beside the road. The defendant dragged the child over 20 feet until he, with the child still pinned underneath the four-wheeler, ran into a full dumpster with such an impact that the dumpster was knocked back approximately three feet. Although the child was screaming in pain, the defendant attempted to restart the four-wheeler so that he could make his escape rather than aiding the victim. When he was unable to start the four-wheeler, he fled on foot across the tundra. Two other adult hunters on four-wheelers observed the incident, and saw the defendant fleeing. While one of the hunters went to render aid to the victim, the second chased down the driver and informed him that he needed to return to the scene and render assistance to the victim and take responsibility for the incident.

When the defendant refused to do so, this good citizen used "a necessary and appropriate amount of force" to return the defendant to the scene, where the police arrested him. The victim suffered a skull fracture and a badly broken leg, but by sentencing appeared to be recovering. The defendant was sentenced to 36 months with 12 months suspended for the vehicular assault, and 12 months with 6 months suspended for leaving the scene, all consecutive. He will additionally be

placed on probation for five years after his release from incarceration.

The first felony of the New Year involved a woman who had a "friend" bail her out of jail over the holidays by posting $5,000 for her release on a felony DWI charge. Her conditions included that she appear at the police station daily and provide a breath sample to insure that she was not drinking. When she did not appear one day shortly thereafter, the police, suspicious that she had begun drinking again, went looking for her. They found her drunk but also found her badly beaten by the man who had bailed her out. He was arrested for felony assault and she was medivaced to the Native Medical Center in Anchorage. She is pending a change of plea in her felony DWI case later in February, and her "friend" is pending indictment and trial for felony assault.

Bethel DAO

ADA Tom Jamgochian indicted two defendants for sexual assault charges. These were the only two defendants indicted for sexual assault charges in January. Other than that, the grand jury was kept busy with assaults, burglary, cocaine and alcohol cases.

ADA Chris Carpeneti indicted a defendant for escaping from Chevak jail after his arrest for assault four (domestic violence). The cell door in Chevak doesn't lock, so the police report they usually handcuff the defendants to the wall if they are awake. This defendant had promised he only wanted to go to sleep and would not run away. Apparently he fibbed because the victim called about half an hour later reporting the defendant was back at her house.

ADA A.J. Barkis indicted yet another burglary of a police station where the intended crime was stealing alcohol from the village police station evidence locker. This has been a recurring issue across the 68 villages in the Delta.

ADA Dave Buettner indicted a case where a brother was shot through a door by a 12 gauge shotgun. The victim will lose an eye; the defendant claimed he was only trying to "scare" his brother.

The Bethel Police Department is still very short-handed, but has recently hired two retired troopers to work two weeks on and two weeks off in alternating schedules for extra help. The Alaska State Troopers are also short-handed in the region, especially the Bethel and Aniak posts.

Fairbanks DAO

During the month the offices presented 49 cases to the grand jury and had seven cases proceed to trial.

Juneau DAO

January got off to a rousing start with a steady influx of new felony cases involving drugs, forgery, theft and assault.

On January 23, ADA Jack Schmidt began a second trial in a 2005 felony DUI case against Lina Garrison. During the first trial, the judge allowed the defendant to present a necessity defense to the jury. After the jury hung, the state appealed the decision to grant a necessity defense. Subsequent to the Office of Special Prosecutions and Appeals' (OSPA's) win on the appeal, the defendant was not able to present a necessity defense at this trial. After deliberating for two hours, the jury returned a guilty verdict, at which point the bifurcated prior convictions portion of the trial began. The defendant took the stand and proceeded to tell the jury that "it wasn't right" that she had been incarcerated for the last eight years for two previous felony DUIs. The jury returned a verdict on the prior convictions in under 20 minutes.

On January 18 ADA Julie Willoughby obtained a conviction against James Luckart on charges of

attempted sexual assault in the first degree, assault in the third degree and assault in the fourth degree after a week long trial in Sitka. The jury returned the verdict four hours after closing arguments. The case arose from an incident on Halloween 2006 when Mr. Luckart wrapped packing tape around the face, nose, and mouth of his sleeping victim and then attempted to assault her sexually. The victim in the case woke up during the assault, began to struggle and was able to fight enough that Mr. Luckart fled the scene.

Kenai DAO

The year started off with five felony DUIs for the new grand jury. They also heard a shooting in which the girlfriend's son shot the boyfriend seven times in the legs and feet. It was an ongoing issue between the 25-year-old son and the boyfriend for the mother's attention. The shooter left the scene and drove directly to the police station; the mother and the boyfriend, who is on felony probation, went to the hospital and refused to talk with the troopers or even say who the shooter was. The best statements came from the medical staff who said that when the victim was brought into the hospital, he said that the shooter was trying to get him to dance. Shades of the Old West.

In a felony domestic violence case, the defendant chased the victim into the woods and held her down while he beat and strangled her. She fled, but he chased after her and tackled her again and beat her some more. He took her back to the apartment and it was not until the next morning that she was able to get to a neighbor's house. She did not call the police, but the friend she did call took her to the hospital and the troopers were notified. She had bruising over much of her body.

An undercover operation with a confidential informant came to fruition when the grand jury indicted four defendants on multiple drug cases for the sale and/or possession of Oxycodone, heroin, LSD, and cocaine.

An investigation into the production of child pornography started in Europe with the arrest of the manufacturer of pornographic videos and moved onto a search of his computer for international sales of his products in 28 different countries. The Europol investigators identified 1,400 customers in the United States. Through a series of search warrants, one customer was identified in Nikiski. Search warrants were served at his residence and he confessed to having the videos sold to him through the European manufacturer. Multiple items of child pornography were located and the grand jury indicted the defendant on 50 counts of possession.

Ketchikan DAO

Defense experts did not do very well in two jury trials.

A Craig jury convicted Tracy Swisher of sexual abuse of a minor in the second degree for sexual contact with his 12-year-old ex-step-daughter while they and her sister were camping in a Forest Service cabin. He claimed that he was sleep-walking when he woke up to find his hand inside the girl's pants and that he stopped when he realized what he was doing. The victim testified that he unzipped her pants, put his hand inside, and while she pretended to be asleep, she rolled over, and that later he zipped her pants back up. The defense had Swisher tested at the Stanford University sleep clinic and had the head of the sleep clinic and professor at the medical school who did the testing appear to testify that in his opinion Swisher was sleepwalking when this occurred. The problem for the defense was that the expert based his opinion on Swisher's description of the event, not the victim's description. As a result, the jury ignored the defense expert's testimony and convicted Swisher.

A Ketchikan jury convicted Lonnie Taylor of theft in the second degree. The defense conceded that

Taylor stole a bike since his stealing the bike was captured on videotape; the defense was that the bike was not worth much and so he was only guilty of a misdemeanor theft. The defense put on an expert witness who sells new bikes to testify that the bike was worthless. The state put on the owner of the bike who testified he bought the bike for $500. The jury rejected the defense expert and convicted Taylor of felony theft for stealing the bike worth $500 or more.

A Ketchikan jury convicted Jimmie Lynch of burglary in the first degree and assault in the first degree. Lynch and Trinity Jackson illegally entered Herb Guthrie's residence in Metlakatla and beat him up. They fractured four of his ribs and back bone and kicked him so hard they left many bruises of shoe prints on him. The doctor testified he had only seen similar bruising on people who had been run over by a car and the bruises appeared in the form of tire treads. Jackson has pled to assault in the second degree, and even though it was not part of the plea offer, he testified about going into the house with Lynch and beating the victim.

A Ketchikan jury convicted Brittany Adelberg driving without a valid license. The defense claimed that she was driving on a driveway, not a street, even though it had a street name. While testifying, Adelberg admitted that her back wheels were on another street that she admitted was a street, and so the jury had no difficulty in convicting her.

Kodiak DAO

Rural Prosecution Unit ADAs Gregg Olson, Regan Williams, and Dwayne McConnell backed up the Kodiak DAO when DA Wallace was required to leave town due to the death of his father. Over the course of three weeks, the unit indicted six separate defendants, including a sexual abuse of minor case wherein a Kodiak man was discovered by his fiancé's daughter's bed on New Year's Day. Support from the unit provided meaningful back up for new ADA Brent Williams who started with the department in December.

Palmer DAO

Aric Tolen was sentenced to a total of 85 years with 15 years suspended for sexual assault in the first degree, assault in the second degree, and assault in the third degree. Tolen cut his girlfriend with a knife, strangled her, and raped her with two young children in the room. At sentencing, Tolen, who had two prior felony convictions, blamed the victim and her family for all of his problems. Judge Eric Smith found five aggravators and equated the rape to "emotional murder." Tolen yelled choice words at the victim and prosecutor while being taken out of the courtroom. ADA Rachel Gernat prosecuted this case.

Judge Eric Smith sentenced Lee O. Stenseth to 20 years with 10 years suspended on charges of misconduct involving a controlled substance in the second degree, misconduct involving weapons in the second degree, scheme to defraud, misconduct involving a controlled substance in the fourth degree, theft in the second degree, and forgery. Stenseth was forging prescriptions and selling Oxycontin. He pled as charged without any plea or sentence bargain on the day of his trial. Evidence collected from his house included his own surveillance video of him injecting drugs into a female. Stenseth did not have any prior felony convictions. The prosecutor in this case was ADA Suzanne Powell.

David Hyche was sentenced by Judge Kari Kristiansen to 14 years with 4 years suspended on a charge of misconduct involving a controlled substance in the second degree. Hyche had a prior drug felony conviction and a long history of manufacturing methamphetamine. ADA Suzanne Powell handled this case for the state.

Robert Greer Jr. was convicted of DUI after a jury trial in the Palmer District Court. Defense counsel argued that the vehicle was started by autostart or

by the passenger. The trial prosecutor was ADA Shawn Traini.

A Valdez jury convicted Keith Doughman of DUI (his third). Doughman went to a store to buy whiskey, and the clerk noticed he was drunk after she sold him liquor. She then called the police. The Valdez Police Chief saw Doughman driving home. Police officers arrived at his home in short order. At trial, Doughman's attorney argued that his client was drinking at home for 15 to 20 minutes before the police arrived, and presented the store receipt with the purchase time. The prosecutor had to prove that the liquor store cash register receipt time was 10 to 15 minutes slow to rebut the defense. As part of Doughman's sentence, Judge Schally imposed a no alcohol condition for four years. ADA Michael Perry prosecuted the case.

Randell Rowton was indicted on seven counts of possession of child pornography and one count of distribution of child pornography. After tips that Rowton had uploaded images of child pornography to a Photobucket account, troopers obtained a search warrant to search Rowton's house in Palmer. They found 8x10 photographs containing child pornography, photographs of local neighborhood girls, and also numerous CD-Rs and VHS tapes. The CD-Rs contained thousands of images of child pornography. DA Roman Kalytiak is the prosecutor.

Judge Eric Smith sentenced 27-year-old Tommie Patterson to 85 years for murder in the first degree and an additional 15 years to serve for kidnapping. Patterson, Mario Page and Kira Gray were convicted after separate trials last year for their participation in the kidnapping and shooting of Terrell Houngues on Mother's Day of 2005. At his sentencing, Patterson denied involvement in the killing. In August 2007, Mario Page was sentenced to serve 70 years with 20 years suspended for murder in the second degree and 20 years with 5 years suspended for kidnapping. Gray's sentencing on charges of first degree murder and kidnapping is scheduled for March 17. DA Roman Kalytiak prosecuted the case.

Office of Special Prosecutions and Appeals (OSPA)

Rural Prosecution Unit

The rural unit traveled much of the month. They assisted in Kodiak for two weeks covering the office. They also traveled to Petersburg to do a felony assault sentencing on the final of the trio involved in a brutal assault which ended with the murder of Petersburg citizen. One attorney traveled twice to the Sitka Training Academy for training of officers to be newly certified in Alaska and Village Public Safety Officer training. Travel to Barrow was to sentence four individuals for sexually assaulting and furnishing alcohol to a single victim.

Appellate Unit

For the appellate unit of the Office of Special Prosecutions and Appeals, January was a month of many briefs and petitions but few opinions from the court of appeals.

AAG Tim Terrell filed an emergency petition for review over a trial court's refusal to correct an elements instruction before the jury began its deliberations. The petition was denied without comment by the court of appeals.

W.S. v. State. The court of appeals affirmed an order requiring restitution from a juvenile in a delinquency case. The opinion rejects numerous arguments made by the juvenile challenging the restitution order and adopted much of the reasoning from AAG Diane Wendlandt's brief.

Tritt v. State. The Alaska Court of Appeals held that the prejudice from a defense attorney's improper opening statement asserting that the state had engaged in misconduct at the grand jury stage could be addressed by a multi-part curative instruction. The court of appeals accordingly

reversed the trial judge's declaration of a mistrial; because of double jeopardy, the reversal means the state cannot retry the defendant. The appeals unit is pursuing a petition for hearing to have the Alaska Supreme Court review the court of appeals' decision, which was contrary to the opinion of two trial judges that a curative instruction would be insufficient.

Special Prosecution Unit

Byron S. George, 57, entered a plea to trafficking in liquor without a license or permit in a local option area this month in Angoon, Alaska. Angoon is a community of 482 residents and located 55 miles southwest of Juneau. The community voted to ban the possession of alcoholic beverages back in 1988. In October of 2006, a nineteen-year-old girl traded two rings with George for four bottles of whiskey. The girl later took 18 ibuprofen pills after drinking some of the alcohol and had to be medivaced from Angoon to Sitka for medical treatment.

Officers executed a search warrant of George's residence and found seven bottles of whiskey in his bedroom and numerous women's rings. George told officers he sold alcohol to pay his bills and had been selling alcohol for less than a year. George received a three-year suspended imposition of sentence on the class C felony, was ordered to serve 180 days jail, pay a $1,500 fine and is subject to special bootlegging probation conditions.

SAVE THE DATE

March 3-5 - NAAG Spring Meeting
Washington, DC